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No. 05-1256

In the

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on third parties.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. In furtherance of PLF's continuing mission to defend economic liberty, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation and a civil justice system that grants excessive liability awards. PLF has participated in several cases before the Supreme Courts of California, Illinois, New Jersey, and other states in cases involving the reach and scope of civil liability and the abuse of punitive damages. *See, e.g., Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63 (Cal. 2005); *Marshall v. Burger King Corp.*, No. 100372, 2006 WL 1703488 (Ill. June 22, 2006); *In re Lead Paint Litigation*, No. 58,531 (N.J. Sup. Ct. *cert. granted* Nov. 17, 2005); and PLF attorneys have published articles on the dangers that a runaway civil justice system poses to American consumers and entrepreneurs. *See, e.g.*, Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owner's Duty to Prevent Criminal Acts on the Premises*, 27 Whittier L. Rev. ___ (forthcoming, 2006).

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case typifies the unfairness which the Due Process Clause was designed to prevent. Moreover, it is indicative of the growing trend toward "regulation by litigation," in which state courts are enthusiastically participating. This trend consists of courts using their power not to remedy the particular injury alleged by a particular party in a particular case, but instead to pursue broad policy goals thought to be good for society in general. *See* G. Edward White, *Tort Law in America: An Intellectual History* 178 (1985) (noting trend toward "conceiv[ing] of tort law as 'public law in disguise'" instead of being "concerned primarily with deterring and punishing blameworthy civil conduct").

When this occurs, lobbying groups try to exploit the judiciary as an alternative policymaking tribunal when their demands have not been met by the legislature. These parties, and their allies in the offices of state attorneys general, use crushing punitive damages awards, vaguely defined common law crimes—or, in this case, the reinterpretation of criminal statutes decades after the conduct in question occurred—and other judicial tools to pursue policy goals that are not part of the judiciary's proper role. The courts exist to remedy and punish harms in particular cases, not to pursue a broad policymaking goal outside the legislative process.

The Due Process Clause sets broad but strong barriers around the activities of state courts. Among these boundaries is the rule of fundamental fairness articulated in this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)—that punitive damages must bear some sensible relationship to the compensatory damages awarded in a particular case. But here, the state court evaded this limit by redefining the conduct at issue as a crime, even though it was legal and reasonable when it occurred. *Cf. Bouie v. City of*

Columbia, 378 U.S. 347, 352 (1964) (states may not adopt "unforeseeable and retroactive judicial expansion of narrow and precise [criminal law] statutory language").

Moreover, the court below assessed punitive damages on the basis of Philip Morris' conduct toward third parties—the details of which can only remain speculative, based on no other evidence than the particularly egregious and emotionally powerful facts of the Plaintiff's own case. Rather than punishing Philip Morris for its conduct toward Mayola Williams, therefore, the Oregon Courts essentially passed judgment on Philip Morris' behavior as a corporate citizen. This is not due process of law. *State Farm*, 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

ARGUMENT

I

COURTS MAY NOT AVOID THE DUE PROCESS REQUIREMENT THAT PUNITIVE DAMAGES REASONABLY RELATE TO THE INJURY BY RETROACTIVELY ANALOGIZING CIVIL CONDUCT TO CRIMINAL CONDUCT

A. The Due Process Clause Rightly Restricts the Awarding of Punitive Damages

The earliest, and still the best, exposition of the meaning of "due process of law" came in Daniel Webster's argument in *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819). Due process of law is "a law which *hears before it condemns*, which *proceeds upon inquiry and renders judgment only after trial.* The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." *Id.* (argument of Mr. Webster) (emphasis added). *See also*

Hurtado v. California, 110 U.S. 516, 535-36 (1884); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (incorporating Webster's definition).

Later courts have continued to acknowledge these three basic due process requirements. First, laws must fairly apprise a party of the conduct that will incur a criminal or civil penalty. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). Second, the law must fairly apprise a party of the penalties that will be incurred by violating the law. *State Farm*, 538 U.S. at 417; *Gore*, 517 U.S. at 574. *See also* Robert A. Levy, *The Conservative Split on Punitive Damages*, 2003 Cato Sup. Ct. Rev. 159, 177 (2003) ("parties must be able to determine which conduct is necessary to conform to the laws dictates: and legal outcomes must be reasonably predictable"). Third, Webster's generality principle requires government to regulate for the general welfare, and not for private advantage or satisfaction. *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996).

In *Gore* and *State Farm*, this Court recognized that these due process considerations must apply to the amount of punitive damages assessed in tort cases. Punitive damages awards perform some of the same functions as criminal penalties, but because "civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property." *State Farm*, 538 U.S. at 417; *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994).

If due process did not constrain courts to rationality, predictability, and fairness in assessing punitive damages, defendants would be exposed to arbitrary and unfair punishment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused"). This would violate "[e]lementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person

receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574.

In addition, the Due Process Clause requires that all government actions advance the genuine welfare of society at large, and not merely the private welfare of particular individuals or special interest groups. *Romer*, 517 U.S. at 632. *See also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). The essential difference between due process of law and arbitrariness is that arbitrariness results from government employing its coercive force on behalf of private factions or individuals rather than society at large. Sunstein, *supra*; *see also* The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature."). Due process requires that government employ its power for the general welfare, not for the private financial benefit of a few. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2661-62 (2005). That is why this Court has declared that the power of a court to award punitive damages "is limited by the obligation to administer justice." *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 224 U.S. 270, 286 (1912).

This Court established guideposts in *Gore* and *State Farm* to help lower courts ensure against arbitrary and extreme punitive damages awards, and awards that benefit particular parties rather than society. In particular, the Court found that due process requires some reasonable ratio between the compensatory damages award and the punitive damages award. *Gore*, 517 U.S. at 580; *State Farm*, 538 U.S. at 418, 425. This ratio requirement ensures that private litigants do not exploit their individual injuries to obtain punitive damages awards far in excess of their actual harms, and which inure solely to their own private benefit. If a jury may award punitive damages in

any amount regardless of the compensatory damages, then the plaintiff's injury might serve as the proverbial tail wagging the dog of erratic, potentially massive punitive damages awards. This is the very definition of arbitrary and discriminatory enforcement. *Hill*, 530 U.S. at 732.

The courts should not serve as a tool for opportunistic litigants or their even more opportunistic attorneys to exploit government power to extract punitive damages—*i.e.*, private profits—from defendants without some sensible ratio between the injury actually suffered and the punitive damages awarded. This Court's basic holdings in *State Farm* and *Gore* were correct and should be preserved.

B. Retroactively Describing Conduct as Analogous to Criminal Conduct to Evade the Ratio Requirement Violates Due Process

The Oregon Supreme Court found that it could "overrid[e]" this Court's due process "concern[s]" by declaring Philip Morris' conduct to be highly reprehensible. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1181 (Or. 2006). It found this reprehensibility by retroactively redefining its criminal laws so as to analogize Philip Morris' conduct to manslaughter. *Id.* at 1179-80. But the court's hindsight reinterpretation of the state's manslaughter statute is fundamentally arbitrary and a violation of due process standards.

The court essentially recharacterized acts that were neither reckless at the time, nor committed without due caution, as analogous to criminal conduct. Yet Philip Morris was never charged with this crime in its many decades of operation, and until the lower court's decision in this case, the idea that Philip Morris had committed something akin to manslaughter would have been rejected as an unreasonable application of the law. *Cf. Bouie*, 378 U.S. at 353 (state may not make an action which was innocent when done criminal or aggravate a crime or make it greater than it was, when committed).

In *Bouie*, civil rights demonstrators entered a store during normal business hours and took seats in the restaurant section. An employee posted a no trespassing sign and the police arrested the plaintiffs, who were convicted of criminal trespass under South Carolina's trespass law. This Court reversed the convictions because the South Carolina Supreme Court's interpretation of the trespass law had enlarged the statute's reach to include the plaintiff's actions, and then retroactively applied the new definition to uphold the convictions. Because this was "punish[ing] them for conduct that was not criminal at the time they committed it," the South Carolina Court's decision "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The Court specifically found that when "construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.* at 354-55.

In a similar manner, the Oregon Supreme Court redefined the recklessness element of its manslaughter statute to declare that Philip Morris' decades-long denial of a scientifically proven connection between smoking and cancer was criminally reckless. Yet at the time that Philip Morris did this, when Ms. Williams began smoking and for many years afterward, it was reasonable for the company to dispute the early scientific studies on the danger of its products, and, more importantly, courts at the time found no civil or criminal fault in the actions of Philip Morris or other tobacco companies. *See, e.g., Green v. Am. Tobacco Co.*, 304 F.2d 70, 76 (5th Cir. 1962) (tobacco companies "could not be held liable . . . against consequences of which no developed human skill and foresight could afford knowledge"); *accord, Ross v. Philip Morris & Co., Ltd.*, 328 F.2d 3, 10 (8th Cir. 1964). *See also* Milby Amott McCarthy, *Tobacco Suits Today: Are Cigarette Plaintiffs Just*

Blowing Smoke, 23 U. Rich. L. Rev. 257 (1989) ("[U]ntil the 1988 decision in *Cipollone v. Liggett Group, Inc.*, no plaintiff had won a products liability suit against a tobacco company."). Indeed, the Fifth Circuit Court of Appeals ruled in 1962 that cigarettes were reasonably fit for the purpose for which they were sold. *Green*, 304 F.2d at 76.

To suggest that Philip Morris' activities "in 1954" of selling cigarettes, and disputing the then-uncertain scientific research on tobacco's harmful effects "would have constituted manslaughter," *Williams*, 127 P.3d at 1179, is absurd and arbitrary—a fundamentally *ipse dixit* conclusion based on a retroactive reinterpretation of the law. This violates the Due Process Clause's prohibition against "judgments without notice." *Gore*, 517 U.S. at 574 n.22 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgement)).

C. Allowing Courts to Use a Defendant's Egregious Conduct to Depart from the *Gore* Ratio Requirement Would Lead to Inconsistent Punitive Damages Decisions

If courts may depart from the ratio requirement of the Due Process Clause on the grounds that a defendant's conduct was especially egregious, lower courts will be free to apply or to ignore this guidepost essentially at will. An "egregiousness exception" to the *Gore* ratio requirement could shield cases involving unpopular or unsympathetic defendants (insurance companies, for example) from judicial review, when these are precisely the cases in which juries are likely to grant excessive punitive damages awards. *See Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("it cannot be ignored that punitive damages may be employed to punish unpopular defendants").

A punitive damages award motivated on the basis of passion or prejudice is fundamentally unfair. *Wanamaker v. Lewis*, 173 F. Supp. 126, 128 (D.D.C. 1959); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 403 (Mich. 2004), *cert. denied*, 126 S. Ct. 354 (2005). Yet the more unpopular the defendant, the more likely the jury is to decide that the defendant's conduct was reprehensible, and the more likely it is to base its punitive damages award on passion or prejudice rather than reason and deliberation. *See Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("punitive damages are frequently based upon the caprice and prejudice of jurors"). If reprehensibility authorizes juries to disregard the *Gore* ratio, therefore, punitive damages awards will be insulated from due process review in *precisely those cases* in which judicial review is most necessary. This problem is accentuated by the fact that "a jury's determination of a defendant's reprehensibility is notoriously difficult for an appellate court to review." Andrew C.W. Lund, *The Road From Nowhere? Punitive Damage Ratios After BMW v. Gore and State Farm Mutual Automobile Insurance Co. v. Campbell*, 20 Touro L. Rev. 943, 968 (2005).

Moreover, allowing reprehensibility to override the ratio guidepost invites attorneys to emphasize the sort of emotionally inflammatory facts, and to employ the type of incendiary rhetoric, that encourages juries to apply inconsistent and unfair punitive damages awards. In *Gilbert*, the Michigan Supreme Court reversed a compensatory damages award in a sexual harassment case after the trial attorney employed inflammatory rhetoric and tactics, including "equat[ing] plaintiff with the victims of the Holocaust," 685 N.W.2d at 403, likening the plaintiff to a dog that had been kicked, *id.* at 404, and "play[ing] on prejudice against corporations." *Id.* There is no question that the plaintiff in that case was subjected to reprehensible and egregious sexual harassment, but these "hyperbolic and vitriolic argument[s]," *id.* at 406, contributed to a jury award of $21

million, which was "the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States." *Id.* at 394. Although punitive damages were not awarded because they are limited by statute in Michigan, *see id.* at 400, it is reasonable to assume that such an award would have been vastly greater had it been allowed.[2] A reprehensibility exception to the *Gore* factors would have insulated such a verdict from judicial review.

Even in the absence of inflammatory rhetoric by attorneys, allowing reprehensible conduct to override the *Gore* ratio requirement would undermine that requirement's effectiveness as a limitation on jury discretion. Juries award punitive damages with high ratios when a defendant's acts are highly offensive, and award punitive damages with low ratios when the converse is true. Lund, *supra*, at 953. Therefore, whenever a jury awards punitive damages with high ratios, judges will use the defendant's reprehensibility to justify an otherwise unconstitutional award, as opposed to the "few" nonratio awards that the Court envisioned in *State Farm*, 538 U.S. at 425. Judges and particularly juries can be convinced of the propriety of virtually any amount of punitive damages in almost any case in which the plaintiff has shown entitlement to receive some punitive damages. Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* 58 (2002) (describing how

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[2] In *Engle v. Liggett Group, Inc.*, No. SC03-1856, 2006 WL 1843363 (Fla. July 6, 2006), the Florida Supreme Court evaluated the inflammatory rhetoric employed by an attorney in a notorious tobacco-related lawsuit. Among other things, the plaintiff's attorney "appear[ed] to compare the tobacco industry with slavery and, by invoking civil rights leaders Rosa Parks and Martin Luther King, appealed to the jury's sense of outrage for the injustices visited upon African-Americans in this country." *Id.* at *18. Nevertheless, the court refused to find that the jury's award of $145,000,000,000 in punitive damages (one-third of Florida's entire GDP) was influenced by passion and prejudice. *Id.* at *19.

jurors' predeliberation tendencies to award punitive damages are transformed into ever more unpredictable and larger awards through the process of deliberation; *e.g.*, "once the jury has agreed that there will be a nonzero dollar award, the arguments for a larger award have a rhetorical advantage and are more persuasive . . . those who argue that 'more' money is necessary to punish a corporation appear to have an upper hand. The unbounded dollar scale affords great latitude in the expression of what 'more' means."). *See also* David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139, 1141 (2000) (finding "a systematic rhetorical advantage held by those arguing for higher dollar awards, an advantage that operates independently of the particular case at issue").

Since this Court's decisions in *Gore* and *State Farm*, lower courts have failed to apply the punitive damages guideposts in a uniform manner. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. Mich. J.L. Reform 441, 468 (2004). *See also Schimizzi v. Ill. Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (reducing punitive damages to approximately 3 times the compensatory damages of $45,000); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (reducing punitive damages award with ratio to compensatory damages of 140:1 to 10:1); *Baribeau v. Gustafson*, 107 S.W.3d 52 (Tex. App. 2003) (upholding $200,000 punitive damages award despite only $500 compensatory damages because reducing punitive damages would not punish or deter egregious conduct); *Johnson*, 113 P.3d 82 (allowing consideration of effects of defendants' acts on third parties when assessing punitive damages); *Simon*, 113 P.3d 63 (reversing primitive damages award based on speculative potential harms that did not occur).

Although some courts have conscientiously applied the ratio requirement to restrain punitive damages awards, Lund,

supra, at 985, others have regularly ignored or overridden the ratio requirement by finding that a defendant's degree of reprehensibility justifies a punitive damages award with a ratio to the compensatory damages award greater than four-to-one. Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 Akron L. Rev. 779, 798 (2004). The result is inconsistent punitive damages awards. Chanenson & Gotanda, *supra*, at 468.

D. Allowing State Courts to Evade the Ratio Requirement in This Way Would Harm Society Through Overdeterrence and Inconsistency

"[R]unaway punitive damages are not good for the legal system." Heather Burgess, *State Limits: Can One State Rule the Country? One State Awarding Punitive Damages for Nationwide Conduct*, 31 Pepp. L. Rev. 477, 478 (2004) (quoting Kennedy, J.). They are inconsistent with the State's goal of deterring future wrongdoing, and they have damaging economic consequences. W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 Emory L.J. 1405, 1407 (2004).

Excessive punitive damages awards run a serious risk of overdeterrence because the potential of devastating liability in a single lawsuit will lead companies to hesitate in investing in or experimenting with new products. These companies owe a duty to their stockholders, however, which means that they will become increasingly likely to stick to tried and true products that have not resulted in lawsuits. The result is to stifle innovation. *See also* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 326 (1998) ("High damage levels suppress innovation across the board. Firms in effect stop innovating because of the substantial penalty that they suffer for new and uncertain product introductions, as opposed to better established technologies.").

Consider the hypothetical situation of BetterDrugs, an established pharmaceutical company that for 50 years has sold Drug A, which has proven effective for 10 percent of breast cancer patients, and has no serious side effects. BetterDrugs considers developing Drug B, a scientific breakthrough which it believes will cure 50 percent of breast cancer patients. But it knows that a competing pharmaceutical company, DifferentDrugs, recently lost a case in which the jury awarded $1 million in compensatory damages and $97 million in punitive damages to the victim of an unforeseen side effect of one of DifferentDrugs' products. DifferentDrugs had conducted extensive safety testing and received government approval, but only discovered the side effect after marketing the drug. The punitive damages award bankrupts DifferentDrugs. Knowing that no matter how extensive its testing, there is always a nonzero chance that Drug B will cause harmful side effects; BetterDrugs would be acting reasonably and responsibly to play it safe, selling its old drug and avoid exposure to potential bankruptcy that would result from pursuing the new drug. The scientific breakthrough is not marketed, innovation is discouraged, and society loses.

This, unfortunately, is not an entirely hypothetical scenario. *See generally* La Fetra, *Freedom*, *supra*, at 648-54. In 1980, eight pharmaceutical manufacturers produced the DPT vaccine; yet, by 1986, there were only two. H.R. Rep. No. 99-908, at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6347-48. According to the American Medical Association, "[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks." AMA Board of Trustees, *Impact of Product Liability on the*

Development of New Medical Technologies 12 (June 1988) *quoted in* S. Rep. No. 105-32, at 9 (1997).[3] In 1992, *Science* magazine reported that two companies had delayed research on an AIDS vaccine as a result of liability concerns. *Supra*, at 10, *citing* Jon Cohen, *Is Liability Slowing AIDS Vaccines?*, Science, Apr. 10, 1992, at 168-69.

In addition to the overdeterrence effect, the availability of extreme punitive damages awards encourages individuals and companies to invest their resources in litigation—either in seeking opportunities to bring cases for potential windfall damages awards, or in overpreparing for defense of such lawsuits—rather than in research, development, or other economically efficient directions. The availability of windfall punitive damages awards sets up a classic rent-seeking situation, which encourages parties to engage in nonproductive activity such as litigation rather than in wealth-creating activity. *See generally*, Gordon Tullock, *Rent Seeking as a Negative-Sum Game*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 16 (James M. Buchanan et al. eds., 1980); *Cf.* James Buchanan & Gordon Tullock, *The Calculus of Consent* 111 (Ann Arbor Paperbacks 1965) (1962) ("[B]argaining opportunities afforded in the political process *cause the individual to invest more resources in decision-making*, and, in this way, cause the attainment of 'solution' to be much more costly."). This harms the public because it distracts people and businesses from productive pursuits.

Finally, allowing excessive punitive damages awards actually undermines their effectiveness as deterrents to wrongful behavior. As the amount and frequency of such awards becomes increasingly unpredictable and disconnected from the behavior it is intended to deter, companies will seek to

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[3] *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:sr032.105.pdf (last visited July 15, 2006).

avoid such damages, not by avoiding that behavior, but by insuring against risk as a whole; they will simply assume that punitive damages are a "cost of doing business," which cannot be avoided regardless of their behavior, but must simply be accepted. "[E]xtremely large awards . . . are highly unpredictable. As a result, these large awards do not have a deterrent effect because the penalties for wrongful conduct are not anticipated. Indeed, empirical evidence suggests that there is no significant safety incentive effect from punitive damages." Viscusi, *Blockbuster*, *supra*, at 1407.

Encouraging the use of a "reprehensibility" criterion among lower courts will only exacerbate these problems. Reprehensibility is a highly subjective term, and its lack of definition will encourage inconsistency in punitive damages awards. Chanenson & Gotanda, *supra*, at 443. In some cases, such as the Ford Pinto case, *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981), reprehensibility was found solely on the basis that a product manufacturer was aware that there was some amount of risk associated with the product. *See* Sunstein et al., *supra*, at 231 ("any kind of corporate risk analysis was a 'red flag' that increased the rate of verdicts against the defendant and the magnitude of the dollar damages award"); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 Rutgers L. Rev. 1013, 1035-36 (1991). Yet every product has some risk, which manufacturers must balance against the product's benefits. *See id.* at 1067 ("the process by which manufacturers render such trade-off design decisions seems not only to be anticipated but endorsed by the prevailing risk-benefit standard for design liability").

Researchers recently conducted over 600 mock-juror sessions to study juror behavior with regard to punitive damages. *See generally* Sunstein et al., *supra*. These researchers concluded that when a company adopts a higher value-of-life estimate in its analysis of what it is worth to save a life, juries impose punitive damages awards an incredible

47% greater than when companies adopt lower value-of-life estimates. *Supra*, at 126 ("Undertaking a cost-benefit analysis of risk does not help a company but instead boosts the value of punitive damages awarded."). This has the "perverse effect" of rewarding companies that place lower values on the risks involved in their products. *Supra*, at 129.

Because juries erroneously yet routinely take this cost-benefit analysis as an indicator of reprehensible conduct, allowing reprehensibility to overcome the *Gore* ratio requirement will accentuate the economic harms caused by excessive punitive damages awards. As one commentator notes,

> if mere knowledge of risk tradeoffs is taken to demonstrate an intent to conceal, then manufacturers could easily be found guilty of concealment by intent. Manufacturers of potentially injury-causing products such as automobiles will almost of necessity generate documents measuring the risk. No manufacturer could publicize all of these documents, which typically contain preliminary estimates that turn out to be erroneous along with crude estimates of myriad potential harms associated with reasonable tradeoffs. If the existence and nondisclosure of such documents becomes evidence of concealment, and therefore the basis for punitive damages, then again the system will not operate properly. Firms would be subjected to unlimited damages for efficient behavior.

Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 Sup. Ct. Econ. Rev. 179, 190 (1997).

Furthermore, if "a jury believes a defendant is guilty of outrageous conduct and deserves to be punished, it might award larger amounts as compensation, particularly if the plaintiff has

portrayed the defendant as a large, deep-pocketed Goliath." J. Stephen Barrick, *Moriel and the Exemplarly Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 Hous. L. Rev. 1059, 1084-05 (1995). The deterrent effect of large punitive damages is lost as there is no longer any incentive for businesses to take preventative measures when they cannot limit their liability. Viscusi, *Blockbuster*, *supra*, at 1407.

II

THE DUE PROCESS CLAUSE DOES NOT ALLOW COURTS TO PUNISH DEFENDANTS FOR CONDUCT TOWARD THIRD PARTIES

A. Punitive Damages Awards Must Comply with Due Process Standards Including Fair Notice

Just as vague or overly broad statutes violate due process by exposing parties to unpredictable punishments and the possibility of arbitrary and discriminatory enforcement, *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), so, too, allowing a party to be subjected to punishment for wrongs it is *assumed* to have committed against parties who are not in court, and whose factual circumstances are impossible to determine, is a fundamental violation of Due Process. *See State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."). A legal regime in which a party can be charged with responsibility for wrongs without a hearing, or in which a party can be punished without an opportunity to assess and challenge the charges brought against him, is fundamentally unfair, a violation of the substantive standards that underlie the Due Process Clause in both its "substantive" and "procedural" dimensions. *See, e.g., Bouie*, 378 U.S. at 352-55; *Lankford v. Idaho*, 500 U.S. 110, 126-27 (1991).

A plaintiff would not, in any other context, be allowed to ask a court simply to assume that a defendant has committed similar harms against other parties, and on that basis to increase the defendant's punishment. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'" (Quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932))); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact [in civil cases] . . . remains at all times with the plaintiff."); *Speiser v. Randall*, 357 U.S. 513, 524 (1958) ("In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof."); *Western & A.R.R. v. Henderson*, 279 U.S. 639 (1929) (state may not allow jury to presume negligence in civil cases). *Cf. Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (character evidence is generally prohibited in criminal cases because it "weigh[s] too much with the jury and . . . so overpersuade[s] them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"). Yet in this case, Philip Morris had its punishment increased on the basis of speculative presumptions that it harmed other parties elsewhere.

Even in mass tort litigation brought in the form of class action lawsuits, the defendant must have an opportunity to challenge whether "each class member" was injured, and if so, "whether defendants . . . caused that [injury]." *Arch v. The Am. Tobacco Co., Inc.*, 175 F.R.D. 469, 489 (E.D. Pa. 1997). *See also id.* at 493 (noting that it "would abrogate the constitutional rights of defendants" for plaintiffs to recover for damages proven only on a "class-wide basis"). "Although many common issues of fact and law will be capable of resolution on a group basis, individual particularized damages still must be proved on an individual basis." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988).

Similarly, a criminal defendant cannot be convicted of a substantively greater crime than that with which he was charged, simply by redefining an element of a crime as a "sentencing factor," and thereby increasing the sentence in the absence of the jury. *See Jones v. United States*, 526 U.S. 227, 232 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)[4] ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). Yet here, Philip Morris has been punished not only for wrongs done to Mayola Williams, but for wrongs alleged to have been committed against an unknown number of unidentified third parties under unknown circumstances—wrongs analogized to criminal manslaughter—with no opportunity to contest these accusations in a court of law.

If punitive damages only punished a defendant for harm to society, they would work parallel to criminal law but would lack the due process restrictions provided in criminal law. *See* W. Page Keeton, *Prosser and Keeton on Torts* 11 (5th ed. 1984) (punitive damages are "in the form of a criminal fine . . . [but] imposed without the usual safeguards thrown around criminal procedure, such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy"); *Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting) ("although punitive damages are 'quasi-criminal,' their imposition is unaccompanied by the types of safeguards present in criminal proceedings" (citation omitted)). That would violate the Fourteenth Amendment. Therefore, this and other courts have found that punitive damages vindicate the

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[4] The principles underlying *Jones*, *Bouie*, and *Apprendi* are not distinguishable just because those cases involved criminal charges while this is a civil case. The Fourteenth Amendment prohibits states from depriving any person of liberty or property without due process of law, in either criminal or civil proceedings. *Gore*, 517 U.S. at 574 n.22.

particular injury to a particular plaintiff, rather than society's interests in general. *See, e.g., State Farm*, 538 U.S. at 423 (courts may not use the punitive damages award as an opportunity to "adjudicate the merits of other parties' hypothetical claims against a defendant"). Moreover, due process restrictions *do* apply to punitive damages. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991).

Due process is offended when a party is punished for alleged wrongs without having the opportunity to defend itself or test each particular charge. Yet it has become routine for trial level tort attorneys to ask juries to award punitive damages based on *all* of the defendants' allegedly wrongful conduct—the nature and circumstances of which are inherently speculative—rather than on the injury to the plaintiff herself. *See, e.g., Gore*, 517 U.S. at 564 (plaintiff's attorney argued that jury should "provide an appropriate penalty" for harming 1,000 people); *State Farm*, 538 U.S. at 415 (parties sought damages based on projections of "a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"); *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521, 535 (N.J. Super. Ct. App. Div. 1995) (noting that, "in numerous . . . cases . . . juries have been requested to punish defendant for its alleged entire course of conduct"); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 (D.N.J. 1989) ("[E]ach jury is told how many persons have been injured or have died or are likely to do so as the result of the defendant's conduct. Those statistics undoubtedly play a substantial role in the jury's . . . determining the amount [of punitive damages] to be imposed."), *vacated in part on reconsideration*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause, but concludes that equitable and practical concerns prevent it from fashioning a fair and effective

remedy."). *See also* Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* 19-20 (2003) (describing how attorneys in tobacco litigation have evaded requirements for individualized proof of wrongdoing).

As Professor Colby concludes,

> If due process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of punitive damages in these circumstances . . . . The defendant can be punished . . . for the harm caused to third parties only if it committed legal wrongs against all of those parties.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 657 (2003).

Unfortunately, courts have been lax in enforcing traditional due process limits in cases involving punitive damages. *See State Farm*, 538 U.S. at 417 (punitive damages "serve the same purposes as criminal penalties [yet] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns."); *Hines*, *supra*, at 780 ("For . . . 125 years . . . no special procedures or precise rules of law were deemed necessary to constrain state courts' imposition of such [punitive] damages."). Thus, recent years have seen a vast expansion of the scope and extent of punitive damages. *See* Rubin, *supra*, at 192 (noting "strongly upward trend" in punitive damages awards); Viscusi, *Blockbuster*, *supra*, at 1413 ("extremely large punitive damages awards are increasing in

frequency and increasing in total value"). The mere fact that punitive damages have not received much due process scrutiny in the past cannot justify allowing such unbridled discretion to remain. *Cf. Tennessee v. Garner*, 471 U.S. 1, 13-15 (1985) ("though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied").

The realms of criminal law, or of evidence, or of other areas of the law, are limited by constitutional, statutory, and common law restrictions which direct the courts' discretion and prevent arbitrariness. This Court's decisions in *Gore* and *State Farm* hold that punitive damages awards must be cabined within similar fairness principles. *State Farm*, 538 U.S. at 416-17; *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 298 (1989) (O'Connor, J., concurring in part) ("A governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law."). To allow states unbridled discretion to award punitive damages for speculative harms to unidentified third parties under unknown circumstances, would deprive defendants of property and liberty without due process of law.

B. Punitive Damages Satisfy Due Process Only When They Are Directed at the Defendant's Particular Wrong in a Particular Case

Early courts and commentators recognized that punitive damages awards posed a threat to due process principles. *See generally* Colby, *supra*, at 613-50; *Wade*, 461 U.S. at 58 (Rehnquist, J., dissenting). *See also* W. Page Keeton, *supra* ("The policy of giving punitive damages has generated much controversy."). These early judges and scholars complained that the concept of punitive damages was not limited by clear legal constraints, punished more than once for the same offense,

unreasonably combined civil and criminal law, and "demoralized an honorable profession by the prizes held out to the litigious and unscrupulous, and their advocates in court expecting to share in the promised confiscation of another man's property." *Quoted in* Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 577 (1881).

A famous debate broke out between Professor Simon Greenleaf of Harvard and U.S. Attorney Theodore Sedgwick, in which Greenleaf argued that punitive damages were unconstitutional and unjust. *See* Colby, *supra*, at 617-18. Sedgwick contended that they vindicated society's interests over and above the plaintiff's interest. *Id.* at 618. Following Greenleaf, several courts found that punitive damages should not be allowed, because of the dangerously vague standards that apply to them. *See, e.g., Fay & UX v. Parker*, 53 N.H. 342, 397 (N.H. 1872), *Stillson v. Gibbs*, 18 N.W. 815, 817 (Mich. 1884); *Quigley v. Cent. Pac. R.R. Co.*, 11 Nev. 350, 373 (1876) (Beatty, J., concurring); *Austin v. Wilson*, 58 Mass. (4 Cush.) 273, 275 (Mass. 1849) ("If [punitive] damages are ever recoverable . . . they cannot be recovered in an action for an injury which is also punishable by indictment . . . . If they could be, the defendant might be punished twice for the same act.").

In the nineteenth century, courts resolved this dispute by holding that, whatever their flaws, punitive damages had been an accepted common law practice for centuries. *See Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. (1 Otto.) 489, 492 (1875); *see also Pac. Mut. Life Ins. Co.*, 499 U.S. at 17-18. More importantly, courts held that the Constitution is satisfied so long as punitive damages were awarded on the basis of particular injuries in identifiable cases, and not to vindicate society's interests in general. *See, e.g., Barry v. Edmunds*, 116 U.S. 550, 562 (1886) ("[punitive] damages [are] calculated to vindicate [the plaintiff's] right[s]"); *Brown v. Swineford*, 44 Wis. 282,

288 (1878) ("Though they are allowed beyond compensation of the private sufferer, [punitive damages] . . . are for the punishment of the private tort, not of the public crime."); *Ward v. Ward*, 41 Iowa 686, 688 (Iowa 1875) ("[punitive] damages are never allowed alone for the purpose of public good through the example given in their assessment. The effect upon the public is but an incident . . . ."); *Watts v. S. Bound R.R. Co.*, 38 S.E. 240, 242 (S.C. 1901) ("punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right").

This view has been reiterated in modern cases. In *Browning-Ferris*, 492 U.S. 257, for example, the Court rejected the argument that the Eighth Amendment limits punitive damages awards, because the Eighth Amendment is concerned "with criminal process and with direct actions initiated by government to inflict punishment," *id.* at 260, and punitive damages are aimed at a party's own particular injury. *See id.* at 275 ("punitive damages advance the interests of punishment and deterrence . . . [but are still] between private parties").

Moreover, the *Gore* proportionality principle is "a direct remnant" of the view that punitive damages are based on the injury to the particular plaintiff, and not on the total harms alleged to have been committed by the defendant. Colby, *supra*, at 639. It would make no sense to require that punitive damages relate to compensatory damages if punitive damages operated only to vindicate society's interests, rather than the plaintiff's own injury. *See also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (punitive damages "are available only on a showing of the requisite intent" to harm the plaintiff).

The constitutional validity of punitive damages was therefore resolved on the theory that they punish the "private wrong to the victim and, in so doing, also benefit the public, but the public benefit is, in a sense, a welcome incidental effect of

private punishment." Colby, *supra*, at 636. Constitutionally valid punitive damages are based on the plaintiff's actual injury, and are not social remedies assessed for harms against society as a whole. Societal harms are reserved for criminal, not civil law.

If this theory is abandoned, and replaced with the view that punitive damages operate simply to vindicate social policy against a defendant for social wrongs as a whole, then the due process concerns that sparked the nineteenth century debate over the validity of punitive damages are rekindled. In this case, Philip Morris is alleged to have committed fraud against an unspecified number of unnamed parties, under unknown circumstances, and entirely on the basis of judicial speculation. *See, e.g., Williams*, 127 P.3d at 1170 n.1 (speculating that "thousands of Oregonians" were injured by defendant's conduct). Without being anchored in proven, compensated injuries, punitive damages become simply a secondary criminal law system which can inflict punishments without trial, without "proceed[ing] upon inquiry" or "hear[ing] before it condemns." *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 581 (argument of Mr. Webster), and without other safeguards such as the protection against double jeopardy, *cf. State Farm*, 538 U.S. at 423 (noting "the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains").

CONCLUSION

The judgment of the Oregon Supreme Court should be *reversed.*

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Respectfully submitted,

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